Consumers Union
Nonprofit Publisher of Consumer Reports

Consumer Federation of America

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

February 12, 2008

Dear Chairman Martin:

Subject: Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangments; MB Docket No. 07-198

Consumers Union (CU) and the Consumer Federation of America (CFA) believe that the Commission is asking timely and appropriate questions regarding the relationship between video programmers and distributors. Any efforts to improve the consumer's pay-television experience requires an understanding of the rules and regulations that govern this relationship. Furthermore, we believe that most of the concerns consumers raise, regarding 1) rising prices, 2) being forced to pay for programming they don't want, as well as 3) finding little distinction in programming options between incumbent or competitive providers, are all the product of this relationship. The Commission's inquiry here is both necessary and long overdue.

Above all else, consumers would benefit from more transparency in this marketplace. Video programmers assert that they are not abusing their retransmission consent rights, while smaller cable operators claim that abuses are rife. Yet it is exceedingly difficult to evaluate the claims of either side without visibility into the contracts being signed for programming. With greater transparency in these contracts, it would be a far simpler matter to evaluate whether the largest programmers are abusing their market power.

This proceeding represents an excellent opportunity to improve rules in the pay-television marketplace to enhance the consumers' viewing

experience and provide more competition between multi-channel video providers. Consumers should have choices in their television providers, and in the content they purchase. But what they get today is a choice of a "basic" tier, provided by Congress to ensure availability of a limited number of local and national network channels, or an "expanded basic" offering, which is a bloated package reflecting whatever programmers can foist upon consumers by leveraging their affiliated programming to "must-have" channels/networks in order to force carriage in the most widely distributed or "expanded basic" tier.

As media companies grow ever larger, these practices have led to steady increases of the "expanded basic" tier, both in price and size—regardless of which provider a consumer selects. The Commission should examine why virtually all distributors offer the exact same packages of programming and why there is little price variation amongst those offerings.

This lack of choice in programming offerings leaves consumers victim of the upward pricing spiral of pay-television. This continued pricing increase reflects a major failure of competitive market forces. The current regulatory regime that governs programming, in fact, ensures that prices will continue to rise because there is no market mechanism for consumers to signal distributors or programmers what programming they value or what programming they do not want. Few other marketplaces shelter sellers more completely than this one. Current wholesale programming and retransmission consent practices cause substantial public interest harms by 1) reducing choice and program diversity for consumers, 2) increasing costs for consumers, and 3) reducing video competition.

Adjustments to program access and retransmission consent regulations could help mitigate the public interest harms of current wholesale practices. Minor adjustments to program access and retransmission consent regulations could foster new choice and flexibility at the retail level.

Programmers and broadcasters could be obligated to offer channels on a standalone basis on reasonable rates, terms and conditions to distributors. This would <u>not</u> prohibit programmers and broadcasters from selling channels in bundles; they would simply need to offer channels individually, in addition to any bundled offering. Programmers and broadcasters could not condition access to any channel on the obligation to distribute the channel on a specific tier or to a required percentage of subscribers.

According to statistics that CU and CFA have reviewed in the present proceeding, it appears that there is reason for concern. In satellite

programming transactions, rights to distribute 13 of the most powerful channels are tied to or bundled with obligations to distribute at least 60 other channels. In retransmission consent, rights to distribute the four major broadcast networks are tied or bundled with at least 35 other channels. On average, 30% of the channels carried on expanded basic and 45% of the channels carried on digital tiers are carried under tying or bundling arrangements imposed as conditions of access to desired channels. These tying and bundling practices have resulted in an increasingly bloated, costly, and standardized expanded basic tier. And it gets worse. Programmers and broadcasters have extended tying and bundling practices to digital tiers, HD tiers, and video-on-demand content. For small and medium-sized cable companies, wholesale tying and bundling stuffs channels, content, and cost on all levels of service.

One possibility before the Commission is simply to offer flexibility to those smaller cable operators who wish for options besides big bundles. If larger cable operators do not choose to exercise these options, that can be their valid choice. But it is imperative that the Commission let smaller cable operators respond to market demand by giving them more wholesale flexibility, and thereby giving consumers more choice in the programming they purchase.

Small and medium-size operators also raise concerns about price discrimination, which may result in rural consumers paying more for broadcast and satellite channels, just because they are served by a smaller system. We can discern no policy basis for disparity in wholesale prices solely due to the size of the distributor, and, as the record suggests, this price discrimination may undercut key policy goals, including broadband deployment. Wholly aside from the program packaging issues, the apparent price discrimination in retransmission consent and satellite programming transactions and the resultant effects on consumers warrant Commission attention.

We hope the Commission will use the opportunity at hand to begin to provide network operators and consumers more balanced options in the video programming marketplace.

Respectfully submitted,

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Consumers Union Consumer Federation of America

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